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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1997

EARL W. KAVANAU,
Petitioner,
vs.
SANTA MONICA RENT CONTROL BOARD,
an agency of the City of Santa Monica, California,
Respondent.

Petition for Writ of Certiorari
to the
California Supreme Court

BRIEF OF WESTERN MOBILEHOME PARKOWNERS' ASSOCIATION, as *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

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This brief is submitted with the written consent of all parties, filed with the Clerk of the Court.[1]

INTEREST OF *AMICUS CURIAE*

Amicus curiae Western Mobilehome Parkowners' Association ("*amicus*" or "WMA") is the leading trade association for California's mobilehome and manufactured housing industry. WMA is a nonprofit, tax-exempt organization organized under the laws of California.

[1]This brief was prepared by *amicus'* counsel, at *amicus'* expense.

WMA's members include owners and operators of more than eighteen hundred mobilehome and manufactured housing communities throughout California. For many young families and older citizens, affordable housing means manufactured housing. Rent controls, regulations of land use and constitutional protection of property rights are matters of great interest to WMA members.

Amicus recognizes that local rent controls and related regulations are facts of life in many communities. Effective legal remedies protect owners of rental property from (and help to deter) such abuses as the action of Santa Monica's elected rent board, dominated by tenant partisans, which deprived this Petitioner of $130,000.

The decision below, however, effectively revives former California precedents, overruled by this Court, that precluded compensation when private property is taken by regulation. The takings clause of the Fifth Amendment has long protected regulated businesses against confiscatory rate regulations by assuring investors a fair return and, if necessary, just compensation. California now denies any compensation, so long as the constitutional issues can be characterized as denial of due process.

STATEMENT OF THE CASE

Many communities control rents. Santa Monica's controls, adopted by initiative in 1979, are among the nation's most stringent, and have fueled extensive litigation. Many reported decisions (and scores, possibly hundreds, of unreported lower court cases) involve Santa Monica's rent law.

Santa Monica's initiative froze rents, rolled them back to levels in effect during 1978, and thereafter allowed minimal annual increases, as well as individual increases, decided upon applications, after hearing and, if necessary, an appeal to an elected rent control board. Tenants comprise a major-

ity of the local electorate. Tenant partisans dominate the rent board.

Current regulations restrict individual increases under a net operating income formula. No increase can, in any event, exceed twelve percent (12%), twice the Employment Cost Index, or $50 per month.[2]

Mr. Earl Kavanau owns ten apartments in Santa Monica, a prosperous coastal suburb of Los Angeles. His building was awash in red ink, and lost more than $98,000 in the twelve months ended October 31, 1989. Under the Board's own formula, Mr. Kavanau was entitled to $35,000 in additional rent, but the Board allowed only $5,184, because of a regulation that limited increases to 12% per annum. Additional increases were to be spread over eight years, condemning Mr. Kavanau to years of heavy losses.

In *Kavanau v. Santa Monica Rent Control Board,* 19 Cal. App. 4th 730, 23 Cal. Rptr. 2d 724 (1994) ("*Kavanau I*"), the court (1) found the 12% percent limit, as applied to Mr. Kavanau, was unconstitutional, (2) directed the lower court to issue its writ, directing the rent board to allow immediate implementation of the full increase computed by the hearing examiner, and (3) required the court, and not the board or its staff, to determine all questions that might arise concerning implementation of the increases.

These increases were prospective, so Mr. Kavanau filed suit to recover the $130,000 he had lost during the four years that elapsed after his original application. Mr. Kavanau

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[2]Santa Monica Rent Control Board (the "Board") Regulation 4107(a). At the time of Mr. Kavanau's original application, Regulation 4107(a) limited increases to "twelve percent (12%) or twice the Employment Cost Index, whichever is greater." *Kavanau v. Santa Monica Rent Control Board,* 19 Cal. App. 4th 730, 731, n.1 23 Cal. Rptr. 2d 724, 725, n.1 (1993).

reasoned that the rent board, having subjected him to confiscatory regulation, had taken his property.

Nonetheless, the California Court of Appeal and the California Supreme Court affirmed the trial court's dismissal of Mr. Kavanau's complaint. The California Supreme Court characterized the underlying imposition of confiscatory rates as a denial of due process, rather than a taking, and denied any remedy, other than further applications to the same elected Board that committed the original constitutional violation several years before.

> In this case, we need not decide whether a rent regulation that violates a particular property owner's right to due process also constitutes a taking, because, assuming it otherwise might, we hold that a remedy for the due process violation, if available and adequate, obviates a finding of a taking. . . .

66 Cal. Rptr. 672 at 686.[3]

SUMMARY OF ARGUMENT

This Court upholds price and rate regulations, so long as they allow investors in regulated businesses a fair return. This principle, long applied to public utilities, rental housing and other regulated businesses, rests upon both the due process and takings clauses of the Fifth Amendment. The state may neither deprive a citizen of property without due process of law, nor take that property for public use without paying just compensation.

The decision below reasons, in effect, that property may be taken without compensation, so long as (i) the deprivation of property can be characterized as a denial of due

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[3] Santa Monica's rent law, an initiative amendment to the city charter, makes no provision for any relief to owners in Mr. Kavanau's predicament.

process, and (ii) the affected citizen has some uncertain prospect for relief in further proceedings before the offending agency.

Price control is unconstitutional if arbitrary, discriminatory or demonstrably irrelevant to legitimate public policies. *Permian Basin Area Rate Cases,* 390 U.S. 747, 769-770 (1968). If regulated rates are insufficient, use of the regulated property is taken without just compensation. *Duquesne Light Co. v. Barasch,* 486 U.S. 299, 309 (1989). The constitutional protections are complementary, not mutually exclusive.

When private property is taken, compensation must be paid. This Court so held in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles,* 482 U.S. 304, 314-315 (1987) *("First English"),* rejecting California's former rule in *Agins v. Tiburon,* 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372, *aff'd on other grounds,* 447 U.S. 255 (1980) that, when regulations take a citizen's property, equitable and declaratory relief were the only possible remedies, and compensation cannot be paid.

In effect, the decision below revives California's former rule in *Agins,* denying compensation for regulatory takings of property. Santa Monica has confiscated a substantial portion of Mr. Kavanau's rental income, in violation of the Constitution. This Court has held that when private property is taken, just compensation must be paid.

I.

SANTA MONICA HAS TAKEN KAVANAU'S PROPERTY.

Under the Constitution, private property may not be taken for public use without just compensation. This Court has held that the Constitution protects all property, real and personal, tangible and intangible. The term "property" as

used in the takings clause includes the entire "group of rights inhering in the citizen's [ownership]." *United States v. General Motors Corp.,* 323 U.S. 373 (1945). It is not used in the "vulgar and untechnical sense of the physical thing with respect to which the citizen exercises rights recognized by law. [Instead, it] denote[s] the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it . . . . The constitutional provision is addressed to every sort of interest the citizen may possess." *Id.* at 377-78.

The Fifth Amendment's takings clause thus protects Mr. Kavanau, his small apartment building, and the income he receives to operate the property. Most rental properties are small businesses, owned by individuals or small partnerships. Rental properties are usually mortgaged. Owners suffering confiscatory returns risk losing the property to creditors through foreclosure or bankruptcy. In a very real sense, their property may be taken from them if regulated rents are insufficient to pay the mortgage. Mr. Kavanau evidently held on long enough to obtain some prospective relief after *Kavanau I.* Not everyone will necessarily be so fortunate.

In *Kavanau I,* the Court of Appeal determined that Santa Monica's arbitrary limitation on rent increases was confiscatory, as applied to Mr. Kavanau's small property. There can be no doubt that confiscatory regulation "goes too far." This Court long ago recognized, in a seminal opinion by Justice Holmes, that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Company v. Mahon,* 260 U.S. 393, 415 (1922).

Later decisions have elaborated upon *Pennsylvania Coal,* identifying various factors that may have particular significance, including a regulation's economic impact, the extent of interference with the owner's reasonable, investment-

backed expectations, the character of the regulation, its purpose and the benefits to the owner, among others. *Penn Central Transportation Co. v. City of New York,* 438 U.S. 104, 123-25, *reh'g denied,* 439 U.S. 883 (1978).

Here, the impact of confiscatory regulations has been substantial, and might have been ruinous. Mr. Kavanau's expenditures and investment are undisputed. He was fairly entitled to expect Santa Monica's rent law to be applied constitutionally. As for character and benefit, the application of Santa Monica's arbitrary limit was confiscatory, without benefit to Mr. Kavanau. Indeed, rent control generally provides no benefits to the owners of rental property. There can be few clearer cases of regulatory taking than confiscatory application of rate regulations.

Kavanau I's determination that Santa Monica had denied Mr. Kavanau a fair return echoed decisions of this Court. More than fifty years ago, the U.S. Supreme Court interpreted a statutory "just and reasonable" standard for gas rates to assure a:

> return to the equity owner ... commensurate with returns on investments in other enterprises having corresponding risks. That return, moreover, should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.

Federal Power Comm'n v. Hope Natural Gas Co., 320 U.S. 591 at 603, (1944) Losses like those Mr. Kavanau suffered preclude maintenance of credit, and invite foreclosure of mortgaged property.

The Court reaffirmed these principles in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989).

> The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be

> confiscatory . . . . If the rate does not afford sufficient compensation, the State has taken the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments.

488 U.S. at 307-308. *Duquesne* confirmed that the constitutional assurance of a fair return rests upon the takings clause of the Fifth Amendment.

California has recognized these principles in other contexts. For example, in *20th Century Insurance Co. v. Garamendi*, 8 Cal. 4th 216, 292-295, 32 Cal. Rptr. 2d 807, 855-57 (1994), a challenge to initiative regulation of consumer insurance, California's Supreme Court explained that:

> The takings clause limits the power of the states to regulate, control or fix prices that producers charge consumers for goods or services . . . The crucial question under the takings clause is whether the rate set is just and reasonable. If it is not just and reasonable, it is confiscatory . . . "A rate is too low if it is 'so unjust as to destroy the value of [the] property for all the purposes for which it was acquired' and in so doing 'practically deprive[s] the owner of property without due process of law [.]' " Thus, a producer may complain of confiscation only if the rate in question does not allow it to operate successfully. (Citations omitted.)

Mr. Kavanau's heavy losses can scarcely be described as "successful" operation. Plainly, he suffered confiscation, and thus, a taking.

II.

WHEN CONFISCATION OCCURS, COMPENSATION MUST BE PAID.

The takings clause does not prohibit appropriation of any citizen's property, but compels the state to pay compensation when property has been taken. Thus, Santa Monica must compensate Mr. Kavanau.

The decision below avoided this seemingly inescapable conclusion by declining to decide whether Santa Monica's violation of Mr. Kavanau's rights constituted both a taking and a deprivation of property without due process of law because further proceedings before the Board are a "valuable benefit that satisfies the takings clause."

Santa Monica's initiative rent control law authorizes no relief to owners in Mr. Kavanau's predicament. The opinion gives no direction, other than an admonition to consider the cost of "confiscatory rent ceilings . . . previously imposed" in any future proceedings. 66 Cal. Rptr. at 686. Mr. Kavanau has no "reasonable, certain and adequate provision for obtaining compensation". *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974). He can only hope that the same Board, applying the same law, and lacking any explicit power to compensate him, will be more generous now, after two lawsuits, and eight years of proceedings in four different courts.

This Court has held, however, that when confiscation occurs, compensation must be paid. In *First English, supra*, the plaintiff church, owner of a camp in the San Gabriel Mountains outside Los Angeles challenged flood control regulations that temporarily precluded all use of the church's property. California courts denied any relief, relying upon the California Supreme Court's opinion in *Agins, supra*, "that damages are unavailable to address a 'tempo-

rary' regulatory taking." 482 U.S. at 312. This Court overruled *Agins:*

> [The Fifth Amendment] provides in relevant part that "private property [shall not] be taken for public use, without just compensation." As its language indicates, and as the Court has frequently noted, this provision does not prohibit the taking of private property, but places a condition on the exercise of that power .... [I]t is designed not to limit the governmental interference, but rather to secure compensation ... Thus, government action that works a taking of property rights necessarily implicates the "constitutional obligation to pay just compensation." ... [T]he Court has frequently repeated the view that, in the event of a taking, the compensation remedy is required by the Constitution.

First English, 482 U.S. at 314-316. See also, *Presault v. Interstate Commerce Comm'n,* 494 U.S. 1, 11 (1990).

CONCLUSION

For these reasons, *amicus* respectfully requests that this Court grant Mr. Kavanau's petition for a writ of certiorari to review and overturn the decision below, which:

- Contravenes authoritative decisions of this Court,
- Implicitly revives precedents overruled by this Court, and
- Deprives Mr. Kavanau of the constitutional remedy for confiscation, merely because the underlying consti-

tutional violation can be characterized as deprivation of property without due process of law.

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Respectfully submitted,

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